A. Sup. Ct. 9-12 Hodges v. Vaughan 27

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~346~~ 119

ASA HODGES, PLAINTIFF IN ERROR,

vs.

MILTON VAUGHAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED DECEMBER 2, 1873.

Affirmed, without opinion

SUPREME COURT OF THE UNITED STATES.

No. 346.

ASA HODGES, PLAINTIFF IN ERROR,

vs.

MILTON VAUGHAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Milton Vaughan against Asa Hodges, a manifest error hath happened, to the great damage of the said Asa Hodges, as is said, and as appears by complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Chief-Justice of the Supreme Court of the United States, this twentieth day of April, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] FRANK E. WRIGHT,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas,
By RALPH L. GOODRICH, *D. C.*

Allowed by—

HENRY C. CALDWELL,
District Judge.

We, the attorn*ies* of Milton Vaughan, waive service of citation in this case.

April 29th, 1873.

GALLAGHER & NEWTON.

The execution of this writ of error appears by the schedule hereto annexed.

FRANK E. WRIGHT, *Clk.*,
By RALPH L. GOODRICH, *Dep'ty Clk.*

JUNE 10, 1873.

2 United States court for the eastern district of Arkansas.

MILTON VAUGHAN }
vs. }
ASA HODGES. }

Be it remembered that upon the trial of this cause that the plaintiff relied upon his declaration and writings sued on, and defendant relied upon his several pleas to said declaration, which declaration is in the words and figures following, to wit:

Declaration by consent substituted in lieu of the original declaration heretofore filed herein, and considered as filed on the day of June, A. D. eighteen hundred and seventy-one, the day on which said original declaration, which has been lost, was filed, and writ of summons thereon

issued, and thereupon Milton Vaughan, who is a citizen and resident of the State of Alabama, plaintiff in this suit, by attorney, complains of Asa Hodges, who is a citizen of the State of Arkansas, and a resident of the eastern district thereof, defendant herein, in a plea of debt:

3 For that whereas heretofore, to wit, on the 22d day of December, A. D. 1859, in the State of Alabama, at, to wit, the eastern district aforesaid, the said defendant, together with Caroline S. T. Hodges, his wife, who is not sued herein, by their certain writing-obligatory, signed with their hands and sealed with their seals, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged themselves to be indebted unto and promised to pay, one day after the date of said writing-obligatory, unto the said plaintiff, the sum of three thousand two hundred dollars, for value received, which bond has been lost and profert thereof cannot be therefore made.

And for that whereas, heretofore, to wit, on the 1st day of January, A. D. 1855, at the State of Alabama, at, to wit, the eastern district aforesaid, the said defendant (by his way and style of A. Hodges by his certain writing-obligatory, signed with his hand and sealed with his seal, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged himself to be indebted and promised to pay unto the said plaintiff, on or before the first day of

4 January, A. D. 1856, the sum of one hundred and seventy-five dollars, with interest from the date of said writing-obligatory, and then and there delivered said last-mentioned writing-obligatory to the said plaintiff, which writing-obligatory is now here to the court shown and a true copy thereof filed herewith.

And for that whereas the said defendant (by his way and style of A. Hodges) heretofore, to wit, on the 26th day of January, A. D. 1857, at the State of Alabama, at, to wit, the eastern district of Arkansas aforesaid, made and delivered unto the said plaintiff his certain instrument in writing, now to the court here shown, wherein and whereby the said defendant then and there acknowledged that the said plaintiff had on said last-mentioned deposited with the said defendant the sum of four hundred and forty-seven dollars and fifty cents, whereby the said plaintiff then and there became entitled to have and receive of and from the said defendant said sum of four hundred and forty-seven dollars and fifty cents on request. Yet the said plaintiff saith that, although the time of payment of said several sums of money in said several instruments in writing hath long since elapsed, and although the said plaintiff hath often requested the payment of said several sums

5 of money and interests in the said several instruments in writing specified from said defendant, yet the said defendant hath wholly failed to pay any of said sums of money or interests in said several instruments in writing specified, or any part of any of the same, but wholly neglects and refuses so to do, to plaintiff's damage of ten thousand dollars, and therefore he brings this suit, &c.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plaintiff.

Copy of 2nd writing-obligatory sued on.

$175.00.]

On or by the 1st day of January, 1856, I promise to pay M. Vaughan the sum of one hundred and seventy-five dollars, with interest from date, for value of him received. Witness my hand and seal this 1st day of January, 1855.

(Signed) A. HODGES. [SEAL.]

Endorsement.

Am't received in Memphis in 1859 ..... 20 00
Cr. in 1860 ..... 20 00

$40 00

6 *Copy 3d instrument sued on.*

$447.50.]

Dr. M. Vaughan has deposited with me four hundred and forty-seven dollars and fifty cents.

Jan'y 26th, 1857.

(Sign'd) A. HODGES.

Endorsement.

Credit of the within in groceries sent from Memphis in 1860 & 1861 ..... $10 00

Filed October 17, 1871.

FRANK E. WRIGHT, *Clk.*

And on October 25, A. D. 1871, it being a day of the October term A. D. 1871 of the circuit court of the United States for the eastern district of Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, as follows:

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Comes the defendant, by Benjamin and Barnes, his attorneys, and files herein his plea in abatement.

7 Which plea in abatement is in the words and figures following, to wit:

And the said defendant, Asa Hodges, in his own proper person comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that at and before the commencement of this action and hitherto, he, the said defendant, was and is a citizen of the western district of the State of Arkansas, and not a citizen of the eastern district of the State of Arkansas, as in said plaintiff's declaration is alleged, and this the said defendant is ready to verify. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

ASA HODGES.

Asa Hodges says that the statements contained in the foregoing plea in abatement are true.

A. HODGES.

Sworn to by Asa Hodges before me this 25th day of October, 1871.

FRANK E. WRIGHT, *Clerk.*

Filed Oct. 25, '71.

FRANK E. WRIGHT, *Clk.*

8 And on November 6th, A. D. 1871, as follows:

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ASA HODGES.

Comes the said plaintiff, by his attorneys, Gallagher, Newton and Hempstead, esqs., and files his demurrer to the plea in abatement of the defendant herein; and comes, also, said defendant, by Benjamin and Barnes, esqs., his attorneys, and said demurrer came on for argument, it being admitted by the attorneys, both of plaintiff and defendant, that the writ of summons in this cause was sued out of this court and served upon the defendant, either upon the 28th or 29th day of June, A. D. 1871; and said demurrer, after argument of counsel, being submitted to the court, and the court being sufficiently advised thereon, is, by the court, overruled. Whereupon the said plaintiff files his first, second, and third replications to the plea in abatement herein filed by defendant.

Which demurrer is in the words and figures following, to wit:

9 Comes the said plaintiff and demurs to the plea in abatement of the defendant herein upon the following grounds:

1st. Said plea sets up no defense to the action.
2d. Said plea sets up no legal defense to the action.
3d. Said plea is in all respects informal and insufficient.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff., Milton Vaughan.

Filed November 6, 1871.

FRANK E. WRIGHT, *Clk.*

And which replications are in the words and figures following, to wit:

Comes the said plaintiff, by his attorney, and as to the plea of defendant by him herein pleaded says, precludi non, &c., because he says that at the time of the institution of this suit, and at the time of
10 the service of process herein upon said defendant, he, the said defendant, was a citizen and resident of the eastern district of Arkansas, without this, that the said defendant was a citizen and resident of the western district of Arkansas; and of this said plaintiff puts himself upon the country.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

And for a second and further replication in this behalf the said plaintiff, by his attorneys, comes and says, precludi non, &c., because he says that at the time of the institution of this suit and the service of process herein upon the said defendant, the said defendant was a citizen of the State of Arkansas, and a resident of the eastern district thereof, without this, that at the time when, &c., the said defendant was a citizen and resident of the western district of Arkansas; and of this said plaintiff puts himself upon the country.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

And for a third and further replication in this behalf, leave of
11 the court being first had and obtained, the said plaintiff says,

precludi non, &c., because he says that after the commencement of this suit and the service of process therein upon said defendant, the said defendant, by his duly authorized attorneys, Benjamin and Barnes, esqs., to wit, on the 29th day of June, 1871, at Little Rock, in the eastern district of Arkansas, entered his substantive appearance to said suit in writing, by then and there assenting to the propounding of interrogatories and the taking and reading of depositions in this cause to be used upon the final trial thereof, as will fully appear by such agreement in writing, attached to the deposition of witness, Milton Vaughan, in this cause, and this said plaintiff is ready to verify. Wherefore he prays judgment.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

Filed November 6, 1871.

FRANK E. WRIGHT, *Clk.*

And on November 7th, A. D. 1871, as follows:

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Came the said plaintiff, by Gallagher, Newton and Hempstead, esqs., his attorneys, and defendant, by Benjamin and Barnes, esqs., his attorneys, and the defendant files his demurrer to the 2d and 3d replications of plaintiff to the plea of abatement filed by defendant herein, and the same, after argument of counsel, being submitted to the court, and the court being sufficiently advised what judgment to render, it is therefore by the court considered and adjudged that the demurrer of the said defendant to the 2d replication of the plaintiff to the plea in abatement filed by defendant, be and the same is hereby overruled, and that the demurrer of the defendant to the 3d replication of the plaintiff to the plea in abatement of the defendant be, and the same is hereby, sustained. Whereupon said defendant asked and obtained leave to withdraw his plea in abatement filed herein, and by consent leave is granted to the said defendant to file his plea or pleas to the merits herein, until Wednesday, the 8th day of November, A. D. 1871.

13 Which demurrer is in the words and figures following, to wit:

And the defendant, Asa Hodges, comes and severally demurs to the second and third replications of the plaintiff pleaded herein, because he says the matters and things pleaded by the plaintiff in his said second and third replications are not good and sufficient in law to authorize said plaintiff to have and maintain his action against this defendant in this court, and he assigns the following causes of demurrer, to wit, the second replication does not set forth and show that said defendant is and was, as is attempted set out in said replication, a citizen of the eastern district of the State of Arkansas, at the commencement of the said plaintiff's action, the sueing out of his writ thereon, or at any time since.

2d. Said replication is double, and for this reason said replication is defective.

And for cause of demurrer to the said plaintiff's third replication, he says that the alleged or supposed substantial appearance, by Ben-

14 jamin and Barnes, attys. of defendant, on the 29th day of June, 1871, was in vacation and not in term-time of this court, and the

consent of said attorneys in vacation, and not upon the record of the court, by which they agreed to the taking and reading depositions in this cause, except as to relevancy, was not and is not such an appearance in substance, in fact, or in law as to bind this defendant or preclude him from relying upon or pleading to the jurisdiction of this court, and really amounts to no waiver or consent to the jurisdiction of this court.

3d. Each of said replications are wholly insufficient in law.

ASA HODGES.

Filed November 7, 1871.

FRANK E. WRIGHT, *Clk.*

And on November 8th, A. D. 1871, as follows:

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vs.
ASA HODGES. }

Came the plaintiff, by Gallagher, Newton and Hempstead, his
15 attorneys. Came also the defendant, by Benjamin and Barnes, his attorneys, and the defendant files his six pleas in bar herein, and also his application and affidavit for continuance of this cause, and said application as verified being by the court found sufficient, it is adjudged by the court that this cause stand continued until the next term of this court, with leave for said plaintiff to file his replications to defendant's pleas within sixty days from this date.

Which pleas in bar are in the words and figures following, to wit:

And the said defendant, Asa Hodges, by his attorneys, comes and defends the wrong and injury, when, &c., and as to the said first count of the said declaration, says that the said supposed bond or writing obligatory for three thousand two hundred dollars therein mentioned, is not his deed, and of this he puts himself upon the country, &c.

BENJAMIN & BARNES,
Attys. for Defendant.

Asa Hodges, the defendant and person named in the above
16 plea, says that the statements contained in said plea are true.

A. HODGES.

Sworn to by Asa Hodges before me this 7th day of November, 1871.

N. L. PEARS, *J. P.*

And the defendant, Asa Hodges, by his attorney, comes and defends the wrong and injury, when, &c., and as to the supposed note or obligation for three thousand two hundred dollars sued on and described in the first count in said declaration mentioned, the said plaintiff ought not to have and maintain his aforesaid action thereon against this defendant, because he says that said note or obligation is not, and was not, under seal, and that the said plaintiff's supposed cause of action thereon did not accrue to the said plaintiff at any time within five years next before the commencement of this suit in manner and form as the said plaintiff hath in said declaration and count mentioned against this defendant. And this the said defendant is ready to verify, &c. Wherefore he prays judgment, &c.

17 BENJAMIN & BARNES,
Attys. for Deft., A. Hodges.

Subscribed and sworn to before me this 17th December, 1872.

FRANK E. WRIGHT, *Clk.*,
By RALPH L. GOODRICH, *D. C.*

And the defendant, Asa Hodges, by his attorney, comes and defends the wrong and injury complained in the plaintiff's declaration, and for plea says actio non, because he says that he fully paid off and discharged to the plaintiff the said several notes and writings obligatory, and each of them, together with all interest due thereon after they fell due, sued on in this action on the day of , 18 , to wit, at said circuit, before the commencement of the said plaintiff's action thereon, and of this he is ready to verify. Wherefore he prays judgment, &c.

BENJAMIN & BARNES,
Attys. for Deft.

And for further plea in this behalf, the said defendant, by his
18 attorney, comes and defends the wrongs and injuries complained of by the said plaintiff in his said declaration, and says actio non, because he says that as to the supposed writings obligatory sued on by the said plaintiff and set forth in his first and second counts in said declaration mentioned, to wit, the writing obligatory for three thousand two hundred dollars, and the writing obligatory for one hundred and seventy-five dollars, that more than ten years has elapsed since the falling due of each of said two writings obligatory and the accrual of his, said plaintiff's, supposed causes of action on each of said writings obligatory without suit thereon next before the commencement of said plaintiff's causes of action thereon. And the said defendant further says, that as to the third supposed writing obligatory set forth and described by the said plaintiff in his said declaration in his third count sued on in this action, that more than five years has elapsed since the falling due of said third writing obligatory and the accrual of his, said plaintiff's, supposed cause of action thereon, without
19 suit thereon, before the commencement of the said plaintiff's cause of action upon said last-named writing obligatory, by reason of all which the said plaintiff is barred of any and all right of action to recover said several sums demanded on each of said writings obligatory sued on against defendant. And this the said defendant is ready to verify. Wherefore he prays judgment, &c.

BENJAMIN & BARNES,
Attys. for Deft.

And the said defendant, by his attorney, for further plea in this behalf, comes and defends the wrong and injury complained of, when, &c., and as to the third supposed cause of action in said plaintiff's declaration mentioned against this defendant upon the supposed writing obligatory sued on and described in the third count of said plaintiff's declaration, as the obligation for four hundred and forty-seven dollars and fifty cents, supposed to be executed by the defendant to the said plaintiff, says actio non, because he says that he does not owe the said sum of four hundred and forty-seven dollars and fifty cents and its interest thereon
20 above demanded, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.

BENJAMIN & BARNES,
Attys. for Deft.

And the defendent, Asa Hodges, by his attorney, comes and defends the wrong and injury complained of by the plaintiff in his said declaration, and says that said plaintiff ought not to have and maintain his aforesaid action against this defendant, because he says that at and

before the time of the commencement of the said plaintiff's action on his said several supposed writings obligatory mentioned in his said declaration against this defendant, the said plaintiff was and still is indebted to the said defendant in a much larger sum of money than the supposed sums of mentioned in said plaintiff's said several writings obligatory, that is to say, in the sum of five thousand dollars, for goods, wares, and merchandise sold and delivered by said defendant to said plaint-
21 iff at the special instance and request of said plaintiff, and also in the further sum of two thousand dollars, for money before that time paid, laid out, and expended to and for the use of said plaintiff at his, the said plaintiff's, special instance and request, and in the further sum of two thousand dollars for money had and received by plaintiff to and for the use of the defendant, to wit, at said circuit and eastern district of Arkansas, and being so indebted, said plaintiff, although often requested, hath failed and refused to pay to said defendant, which said sums of money so due and owing from said plaintiff to said defendant *is* wholly unpaid, and exceeds the money so due and owing from the said defendant to the said plaintiff, and which said sums of money so due and owing from the said plaintiff to the defendant as aforesaid, he, the said defendant, is ready and willing, and offers to set off and allow against the said supposed sums of money so remaining due and owing on said plaintiff's supposed writings obligatory, according to the form of the statute in such cases made and provided. And this the said de-
22 fendant is ready to verify. Wherefore, he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him, &c.

BENJAMIN & BARNES,
Attys. for Deft.

Filed Nov. 8, 1871.

FRANK E. WRIGHT, *Clk.*

And which application for continuance is in the words and figures following, to wit:

The defendant, Asa Hodges, makes affidavit and says: He is not ready for trial in this suit at the present term of the court, and cannot get ready for said trial. He asks a continuance of said suit until the next term of the court for justice, and not for delay, upon the following grounds, to wit: He has, as he is advised, believes, and states, a just and valid defense to said action, that the plaintiff is not entitled to recover against him. He states that this suit was commenced against him in the latter part of the month of June, 1871; that after the
23 commencement of said suit the plaintiff's declaration was, by accident, lost or mislaid, and he could not plead thereto or properly present his defence until after the said plaintiff, within a few days past, substituted a new declaration; that he has been anxious to prepare his defense and take his testimony, and has used every reasonable exertion to do so. He has made frequent trips to Memphis, Tennessee, pending this action and recently, to hunt up and obtain the depositions of material witnesses *by* whom he can, if time is given him until next term of this court, obtain as he verily believes. He states that the two small notes or obligations sued on were actually paid off and discharged when the pretended note for $3,200 sued on was given; that said $3,200 note or obligation was not under seal and delivered as a sealed instrument, as alleged in the plaintiff's declaration, and is not binding on him as a sealed instrument; that the same is not his act

and deed as an obligation or instrument sealed and delivered; that the same is barred by lapse of time, as well as the two other notes or obligations sued on. He states that long before the commencement
24 of this suit he paid off and nearly discharged, as he verily believes, said note for $3,200, through the firm of Pucket, Hodges and Ward, commission-merchants, of Memphis, Tennessee. Said firm did business in Memphis, Tennessee, in 1860 and 1861, and during said years he paid to said plaintiff about $2,000 in the way of supplies to plaintiff in sugar, coffee, bagging and rope, nails, bacon, lard, soap, tobacco, cloth for plaintiff and his servants, and divers other articles, which were received by plaintiff in discharge of the debt of $3,200. He also advanced plaintiff, through said house of Pucket, Hodges & Ward, divers large sums of money in payment of said debt, all at the instance and request of the said plaintiff, and which he has failed and refused to credit him, defendant, or account for; that Pucket & Ward are dead, and have been for several years; that defendant can prove by William Ward the payments herein named under the circumstances named; that he was the clerk and book-keeper of said Pucket, Hodges and Ward when said articles were furnished and money paid; that he
25 has made repeated efforts to take and obtain said William Ward's testimony; he resides somewhere in the State of Tennessee, but his whereabouts he has, up to this time, been unable to ascertain, although he has been to Memphis frequently and recently to obtain said information and testimony, and made diligent and repeated inquiries for said Ward, and actually employed Mr. Bryant, an attorney at law, residing in Crittenden County, Arkansas, near Memphis, to hunt up said Ward and obtain his testimony. This employment was soon after the commencement of this suit, and said attorney faithfully agreed to attend to said matters and obtain said testimony. He can also prove the payments named by Joseph Pucket, who was the shipping-clerk in 1860 and 1861 for the firm of Pucket, Hodges and Ward, and shipped the articles named of the value named to plaintiff in 1860 and 1861, and that plaintiff received said articles, as he believes. Said Joseph Pucket's residence is also unknown to defendant; he resides, as he is informed and believes, somewhere either in Tennessee or Missis-
26 sippi; that he is actively engaged in travelling around in different parts of Tennessee and Mississippi; he made the same efforts to obtain his testimony as he did in reference to the testimony of William Ward, and employed the attorney named to hunt up and obtain the testimony of said Pucket. He is very much surprised that he has been, up to the present time, unable to obtain the testimony of said witnesses. He further states that he believes if time is given him until the next term of this court, that he can obtain other testimony conducing to make out and establish his defense to this action; but he does not know that he can prove the facts set up herein by any other witnesses than said Wm. Ward and Joseph Pucket. He will make every reasonable exertion to prepare his case for trial by the next term of this court. He further states that when he proves the facts and statements herein he believes they will be true.

A. HODGES.

Sworn to before me this 7th day of November, 1871, by the within-named Asa Hodges.

JOHN WHYTOCK,
Cir. Judge.

Filed Nov. 8, 1871.

FRANK E. WRIGHT, *Clk.*

27 And on December 7th, A. D. 1871, as follows:

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ASA HODGES.

Came the said plaintiff, by his attorneys, Gallagher, Newton and Hempstead, esqs., and, pursuant to the leave heretofore granted in this cause, files his similiter to the first plea and his motion to strike out the second plea, and his replication to third plea, and his two replications to the fourth plea, and his similiter to the fifth plea, and his replication to the sixth plea, filed by the defendant herein.

Which pleas are in the words and figures following, to wit:

And the said plaintiff, by his attorneys, comes, and for replication to the first plea of the defendant, whereby he puts himself upon the country, the said plaintiff doth the like.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

28 And as to the second plea of the said defendant by him herein pleaded, the said plaintiff moves to strike the same from the files of this court, because the same, although it purports to be in fact a plea of non est factum, the same is not verified by the affidavit of said defendant. Wherefore, &c.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Deft.

And as to the third plea of the defendant by him herein pleaded, the said plaintiff says precludi non, &c., because he says that the said defendant on, &c., at, &c., in said plea mentioned pay off and discharge the said several instruments of indebtedness in the said declaration mentioned, and of this said plaintiff puts himself upon the country.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

And as to the fourth plea of the defendant by him herein, the said plaintiff to so much thereof, wherein and whereby the said defendant seeks to avoid the plaintiff's recovery upon the several writings-
29 obligatory in the first and second counts of the said declaration mentioned, by pleading thereto the statute of limitations of ten years, the said plaintiff says precludi non, &c., because, he says that, after the accrual of the said several causes of action in the said two counts of said declaration specified, a state of hostilities existed between the United States and several of the States composing the same for a long space of time, to wit, from the 18th day of December, A. D. 1860, until the day of August, A. D. 1866, whereby the ordinary course of justice was interrupted, and judicial process could not be served upon said defendant; wherefore said plaintiff says that his cause of action in the two first counts of his said declaration mentioned did accrue within ten (10) years next before the commencement of this suit, and this the said plaintiff is ready to verify. Wherefore he prays judgment upon said two first counts in his said declaration specified.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

30 And as to so much and such part of the fourth plea of said defendant, wherein and whereby the said defendant seeks to avoid the plaintiff's recovery upon the instrument in writing in the third count of the declaration of plaintiff, by pleading thereto the statute of limitations of five years, the said plaintiff says precludi non, &c., because he says that, after the accrual of the cause of action in the said third count of said declaration specified, a state of hostilities existed between the United States and several of the States composing the same, and continued for a long space of time, to wit, from the 18th day of December, A. D. 1860, until the day of August, A. D. 1866, whereby the ordinary course of justice was interrupted, and judicial process could not be served upon said defendant; wherefore said plaintiff says his cause of action did accrue within five years next before the commencement of this suit in the third count of his said dec-
31 laration specified, and this he is ready to verify. Wherefore he prays judgment, &c.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

And as to the fifth plea of defendant, whereby he puts himself upon the country, the said plaintiff doth the like.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

And to the sixth plea of defendant by him herein pleaded, the said plaintiff saith precludi non, &c., because, &c., on, &c., at, &c., in said fifth plea specified, the said plaintiff was not, nor is he, indebted, nor did he, nor does he, owe the said several sums of money in said plea specified, and of this he puts himself upon the country.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.

Filed Dec. 7, 1871.

FRANK E. WRIGHT, *Clk.*

32 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the eighth day of April, anno Domini one thousand eight hundred and seventy-two, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on April 13th, A. D. 1872, as follows:

MILTON VAUGHAN
vs.
ASA HODGES.

Comes the plaintiff, by Gallagher, Newton & Hempstead, his attorneys, and comes the defendant by Benjamin and Barnes, his attorneys, and by consent this cause is continued.

33 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden

on Monday, the 28th day of October, anno Domini one thousand eight hundred and seventy-two, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on November 22, A. D. 1872, as follows:

MILTON VAUGHAN
vs.
ASA HODGES.

Comes the defendant, by Benjamin and Barnes, his attorneys, and files herein his similiter to plaintiff's replication to his third plea, and also his two rejoinders to plaintiff's two replications to his fourth plea, which pleas are in the words and figures following, to wit:

The defendant, for a similiter to the replications to the 3d
34 pleas, says that as the plaintiff puts himself on the country, this defendant doth the like.

BENJAMIN & BARNES,
Attys.

And for a rejoinder to the replications to the 4th pleas this defendant says precludi non, because he says that, from day of , 1860, this defendant was a citizen of the State of Arkansas, and it is not true that hostilities existed between the United States and the State of Arkansas from the 18th day of December, 1860, to of August, 1866, whereby the ordinary course of justice was interrupted and judicial process could not be served on this defendant, and of this he puts himself on the country.

BENJAMIN & BARNES.

And for a further rejoinder to the replication to the 4th pleas the defendant says precludi non, because he says that the plaintiff from A. D. 1860, to A. D. 1871, was and still is a citizen, resident, and inhabitant of the
State of Alabama, and that this defendant during said time was a cit-
35 izen, resident, and inhabitant of the State of Arkansas, both of which States were on the day of August, 1861, by the proclamation of the President of the United States declared to be in insurrection, and said proclamation prohibited all commercial intercourse between all citizens of the State in insurrection and of the citizens of the States not in insurrection, but this defendant avers that neither said proclamation nor any law whatever ever prohibited commercial intercourse between the States in insurrection; and this defendant avers that the Congress of the United States passed a law suspending the statute of limitations between citizens of the States in insurrection and the citizens of the States not in insurrection, but said law in no way suspended the statute of limitations between the citizens of the States in insurrection, among which were the States of Alabama and Arkansas, and this defendant avers that during the time named in said replication the courts in and for the State of Arkansas were open and the ordinary course of justice
was not interrupted and the defendant could have been served
36 with judicial process, wherefore this defendant avers that as between the plaintiff and this defendant, both of whom were, during the late insurrection, citizens of the different States that were in insur

rection, the statute of limitations were in no way suspended or stopped running against the supposed obligations and notes sued on, and this he is ready to verify. Wherefore he prays judgment.

BENJAMIN & BARNES,
Attys.

Filed Nov. 22, '72.

FRANK E. WRIGHT, *Clk.*,
By RALPH L GOODRICH, *Dep'ty Clk.*

And on December 7th, A. D. 1872, as follows:

MILTON VAUGHAN
vs.
ASA HODGES.

Comes the plaintiff, by Gallagher & Newton, his attorneys, and
37 on their motion it is ordered that this cause be continued at plaintiff's costs.

And on December 11th, A. D. 1872, as follows:

MILTON VAUGHAN
vs.
ASA HODGES.

The defendant by his attorneys, Benjamin & Barnes, asks leave to amend his second plea by swearing to the same, whereupon the court ordered that as soon as the plaintiff swear' to said plea then said motion to strike out said plea shall be considered overruled.

38 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that, at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 14 day of April, anno Domini one thousand eight hundred and seventy-three, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on April 16th, A. D. 1873, as follows:

MILTON VAUGHAN
vs.
ASA HODGES.

Come' the said plaintiff, by Gallagher & Newton, esqs., his attorneys; comes also the defendant, by Benjamin & Barnes, his attorneys; and it appearing that the defendant has sworn to the second plea filed by him herein, it is therefore ordered that plaintiff's motion to strike out the same is hereby overruled. Whereupon the plaintiff files his replication to the second plea of defendant filed herein; and thereupon, by consent, the defendant's second rejoinder to the plaintiff's two replications to defendant's fourth plea filed herein is considered as applying and being filed in answer to plaintiff's replication to the second
39 plea of defendant filed herein, and by consent said plaintiff enters in short upon the record his demurrer to said rejoinder of said

defendant to said plaintiff's replication to said defendant's second plea filed herein; which demurrer is by the court sustained. And it being stated by the plaintiff's and admitted by the defendant's counsel that at the last term of this court the demurrer of plaintiff to the rejoinder of the defendant to the two replications of plaintiff to the fourth plea of defendant filed herein had been submitted to the court and by the court sustained, but by misprision the same had not been entered of record, it is therefore, on motion of plaintiff's counsel, that said demurrer to said rejoinder of said defendant to said plaintiff's two replications to said fourth plea of defendant be sustained, and that entry thereof be considered as now entered as of the last term of this court; to which opinion of the court in sustaining the said demurrers the defendant at the time excepted.

Which pleas are in the words and figures following, to wit:

40 Comes the said plaintiff, by his attorneys, Gallagher and Newton, and as to the second plea of the defendant by him herein pleaded, says that, protesting and aver'ing that the instrument in writing sued on by said plaintiff, and in the first count of his said complaint set forth, and in said defendant's second plea mentioned, was a writing obligatory executed under the hand and seal of said defendant, Asa Hodges, as in said complaint in the first count thereby aver'ed and charged, and not a simple contract or promissory note as in said second plea averred, says that as to so much of said second plea of said defendant wherein and whereby the said defendant strives to avoid the plaintiff's recovery upon the instrument in writing in the first count of the declaration of the said plaintiff by pleading thereto the statute of limitations of five years, the said plaintiff says precludi non, &c., because he says that after the accrual of the cause of action in the said first count of said declaration specified, a state of hostilities ex-

41 isted between the United States and several of the States composing the same, and continued for a long space of time, to wit, from the 18th day of December, 1860, until the day of , A. D. 1867, whereby the ordinary course of justice was interrupted and judicial process could not be served upon said defendant, wherefore said plaintiff says his cause of action did accrue within five years next before the commencement of this suit in the 1st count of his said declaration specified, and this he is ready to verify. Wherefore he prays judgment, &c.

GALLAGHER & NEWTON,
Attys. for Plff.

Filed April 16, 1873.

FRANK E. WRIGHT, *Clk.*,
By RALPH L. GOODRICH,
Dep'ty Clk.

Which similiter and demurrer are in the words and figures following, to wit:

42 Comes the said plaintiff, by his attorneys, and as to the first rejoinder of said defendant to the two replications of plaintiff to the fourth plea of defendant whereof he puts himself upon the country, the plaintiff doth the like.

GALLAGHER & NEWTON,
Attys. for Plff.

And as to said defendant's second rejoinder to the two replications of plaintiff to the fourth plea of defendant, the said plaintiff, by his attor-

ney, comes, &c., and demurs in law to the same, and for cause of demurrer says, that the same is not sufficient in law to bar or preclude said plaintiff from having or maintaining his aforesaid action, &c. Wherefore he prays judgment, &c.

GALLAGHER & NEWTON,
Attys. for Plff.

Filed December 6, 1872.

FRANK E. WRIGHT, *Clk.*,
By RALPH L. GOODRICH,
Dep'ty Clk.

43 The plaintiff then introduced as a witness the plaintiff, Milton Vaughan, who testified, upon the trial, that he was the plaintiff in this suit; that he was acquainted with the defendant, Hodges; that he had known the defendant for many years before this suit; that he, plaintiff, was a citizen and resident of the State of Alabama, and defendant was a resident and citizen of Arkansas; that on the 22d day of December, 1859, in the State of Alabama, at the house of defendant, he and defendant had a settlement of their transactions and accounts, and that upon said settlement the defendant executed to him, plaintiff, his bond of that date, due one day after date, under seal, which bond was signed by the defendant and his wife, Caroline Hodges, for the sum of three thousand two hundred dollars; that said note was given upon said settlement for balances found to be due him, plaintiff, from defendant, for debts put into his, defendant's, hands, as an attorney at law, to collect; that the two other writings sued on were not embraced
44 in said settlement, and were not then paid, and were not mentioned by either party at said settlement and execution of said note; that he did not think of said notes, not lost, as sued on herein; that said three thousand two hundred dollar note was lost and destroyed by accident during the late war, he, plaintiff, having hid out said note with other valuables, to save them from depredation and loss; the said note, from exposure, was obliterated and destroyed, and he could not, therefore, file or produce it in evidence in the case; that said note is still due and unpaid to him, as well as the other two notes sued on in this action, except about two or three hundred dollars, received by him in 1860 and 1861, in groceries and supplies furnished him by the house of Puckett, Ward and Hodges, at the instance of said Hodges; that said Hodges was a member of said firm of Puckett, Ward and Hodges; that he met defendant during the war, some time in 1863, and Hodges then offered to pay said thirty-two hundred dollars in confederate money, which he, plaintiff, refused; but said Hodges did not allude, at that time, or any other time after the 22d day of December,
45 1869, to the two small demands sued on. He also testified that a short time before he commenced this suit, that he visited Little Rock, Arkansas, where Hodges then resided, to collect his debt, but did not find him at home; he was then a candidate for the senate of Arkansas; that he proceeded to Memphis, Tennessee, hunting Hodges; and not finding him at Memphis, and being informed that he was at the town of Marion, Crittenden County, Arkansas, he proceeded to that point and found him, and called his attention to his indebtedness to him, plaintiff; but the defendant did not pay or settle with him, but stated that as soon as the election then pending was over he would meet him, Vaughan, in Memphis, and settle with him. Defendant advised him to go to a hotel in Marion, as he could entertain him well on account of the crowd at his house; that he accordingly went to

a hotel and remained until next day, when Hodges, in the evening, came riding by and asked him, Vaughan, if he was ready to go with him to Memphis. He stated that he was not, because he had no
46 conveyance or means of going. Hodges would not remain, but galloped off toward Memphis, stating that he would meet him on the next day at the house of his commission merchant, and then adjust matters; but he found, when he arrived in Memphis, that Hodges had left for Little Rock; but he found for him a letter, written by Hodges and left with a man by the name of Dowdy.

(The defendant then objected to plaintiff testifying in reference to said letter, and called for the production of said letter as the best evidence.)

It was shown by the evidence of the plaintiff that the said letter was lost; that he had made repeated and thorough search for said letter among all his papers, and that it could not be found; and it was not until after this that the court allowed secondary evidence of the contents of said letter to be given. The defendant still objected to plaintiff testifying to the contents of said letter; but the court overruled said objection and permitted plaintiff to give
47 evidence in reference to the contents of said letter, to which ruling and evidence the defendant by counsel at the time excepted and still excepts. The plaintiff then testified that he received said letter, read it, knew it to be in the handwriting of defendant; that he put it in his pocket, took it home, and, by some means, accidentally lost the same; had made frequent and diligent search for said letter and could not find it. The defendant still objecting to said testimony, the court overruled said objection and permitted the plaintiff to give evidence to the jury of the contents of said letter, to which defendant then excepted and still excepts. The plaintiff then proved that said letter stated that he, Hodges, had left the matter of the settlement in the hands of his commission-merchant, Dowdy, who had custody of the defendant's books of accounts, with power to fully act for him in the premises; the plaintiff then offered to prove the statements to him made by said Dowdy in reference to said matter, to which the defendant objected, but the court overruled said objection and permitted said plaintiff to
48 prove the statements of said Dowdy made to him respecting a settlement of their matters, to which ruling of the court the defendant at the time excepted and still excepts; whereupon plaintiff proceeded to testify, and proved that said Dowdy stated that he had examined the mercantile books of Pucket, Ward and Hodges, and was willing to settle with him, plaintiff, by the books, and thereupon offered for the defendant to pay him, plaintiff, in full satisfaction of his claim against the defendant, four hundred dollars in cash, four hundred dollars in twelve months, and four hundred dollars in two years, without interest, to which proposition he, plaintiff, refused to accede, and the matter then ended, and he went home and soon after brought suit to recover said demand in this court. The plaintiff proved that he purchased all his supplies for 1860 and 1861 in Memphis, from the house of Pucket, Ward & Hodges, and the articles purchased were sent to him by the Memphis and Charleston Railroad; that his family was small—consisting of a few negroes and only one white person, himself, and the
49 whole amount of articles purchased and received by him, as named, could not, and did not, exceed from two to three hundred dollars; that he was confident of this; that defendant gave him orders to said house for said articles. He also proved that he received said articles toward the payment of his claim against defendant, but had

never entered defendant a credit therefor. He also proved that no person but himself and defendant was present when said settlement was made, and the note for three thousand two hundred dollars was executed. He also proved that defendant, before the settlement, had agreed to give him his brother as security, but he failed to do so, and in lieu thereof defendant gave him Mrs. Caroline Hodges, his wife, as security. He stated that he did not tell or inform Hodges at any of his interviews with him, after the execution of said note, that it was lost or destroyed, and he denied, upon being interrogated by defendant, that he told defendant at Memphis that he had the note for $2,200 with him. He proved that he was born in 1805, was in delicate
50 health, but his memory was good, and he distinctly remembered positively everything he had stated. He also proved that he knew, when he made said settlement and took said $3,200, that Hodges was about to move away from the State of Alabama and to Memphis, Tennessee, notwithstanding all which he did not mention the other two notes in said settlement, or produce them to Hodges and ask him to pay them.

This being all the evidence offered by the plaintiff on said trial in any, the defendant Hodges then offered and read in evidence the agreement to take depositions signed by plaintiff and defendant's counsel, heretofore made, and then also read in evidence to the jury the depositions of Susan Pucket, and Pucket, and the accounts attached to said deposition of Puckett in favor of defendant and against plaintiff.

Interrogatories to be propounded to Mrs. Susan Pucket, William Pucket, and L. Higgs, on the part of the defendant, Asa Hodges.

51 First interrogatory to be propounded to Mrs. Susan Pucket:

1st. Do you know the plaintiff and defendant to this action; if so, how long have you known them, and how intimately, and under what circumstances have you known them, when and where you last saw them, together or separately, and under what circumstances?

Second. State whether or not you were present at a settlement made between Dr. Milton Vaughan, plaintiff, and Asa Hodges, defendant, on the plantation of said Asa Hodges, in December, 1859, or at any other time or place; if so, state what was said by either party in relation to plaintiff desiring defendant to execute to him a bond or note under seal, instead of the bond or note defendant had given him, plaintiff, for the balance claimed to be due plaintiff on said settlement. Detail the whole conversation that took place between plaintiff and defendant. Then state whether or not the note then given by defendant and wife to plaintiff was not in full of all due and owing plaintiff by the
52 defendant up to and including said date; if not, state what other notes, obligations, or debts the said plaintiff claimed as being due and owing to him by the defendant, and on what account or consideration?

Third. State all you know, if anything, in addition to what you have stated, in answer to the first and second interrogatories.

The defendant propounds the same interrogatories to the witness, William Puckett, as propounded to his mother, Mrs. Susan Puckett.

Interrogatories to be propounded to the witness, L. Higgs, by the defendant, Asa Hodges.

1st. Please state or detail the conversation, if had in your presence, at any time with you and plaintiff, Vaughan, about one year ago, or at the time you had it, if at all, in relation to what defendant, Asa Hodges,

owed him. State whether or not plaintiff stated that he was
53 desirous to see defendant in person; and, if so, what he said in that conversation in reference to his desire to procure a renewal of the indebtedness of said defendant to him; state fully all that was said in said conversation upon said subject by the said plaintiff.

Agreement.

We agree that the above interrogatories may be propounded and the answers thereto reduced to writing and attached hereto, at such time and place as the same can be obtained, and that such answer may be read in evidence on the part of the defendant at the trial of this cause, subject to objections, to competency, and materiality alone.

GALLAGHER & NEWTON & HEMPSTEAD,
Atty.' for Plff.
BENJAMIN & BARNES, *Attys. for Deft.*

We agree that the above interrogatories may be propounded to such other witnesses as said defendant may desire, and their answer
54 thereto read with like effect as the above, and subject alone to same exceptions as above.

GALLAGHER, NEWTON & HEMPSTEAD,
Attys. for Plff.
BENJAMIN & BARNES, *Atty. for Deft.*

Deposition of Susan Puckett.

Witness states that she is well acquainted with both parties, plaintiff and defendant; have known them both since 1858. In the fall of 1859 defendant employed my husband to go with him to a new plantation in Crittenden County, Arkansas, and overseer for him in 1860. While he was overseering for defendant in Alabama, the year 1859, sometime in December, 1859, the defendant came to the plantation in Alabama and sent for Dr. M. Vaughan to come over to the plantation and settle up their business. The plaintiff came over that evening, and plaintiff and defendant sat down and made a settlement of all their matters up to that date, so they both stated as they closed their settlement.
55 Defendant drew up receipt and a note for the balance due of some thirty-one or two hundred dollars, and handed the note to plaintiff, and plaintiff read it and said the note was not under seal. Defendant and wife had signed, and defendant replied that it was due one day after date, and would be paid before many months or years, and that it made no difference about the note being under seal; so plaintiff folded up note and defendant put up the balance of papers. Witness states that she understood from plaintiff that he did not want the money that was due, but wanted a note with defendant's wife as security, and the note for all the balance due plaintiff; and the settlement was made between plaintiff and defendant with that view. Everything due to plaintiff was embraced in the note executed by defendant and wife, as before stated. Witness states that she has answered all the interrogatories propounded to her in answer to the first interrogatory as fully as she recollects.

SUSAN S. PUCKETT.

Deposition of Joseph Pucket.

Witness states that he is thirty-seven years of age.
56 Witness states that, in 1860 and 1861, he was employed by the firm of Puckett, Hodges and Ward, of Memphis, to

buy and ship goods to their customers and fill orders. Witness states that he fil'ed a number of bills of goods and shipped to Dr. M. Vaughan in Alabama for Puckett, Hodges and Ward, and consisting of bacon, flour, sugar, coffee, soap, bagging, twine, pepper, salt, molasses, and various other things. Witness states that he has examined Dr. M. Vaughan's account as charged on the books of Puckett, Hodges & Ward for the year' 1860 and 1861, and he does not know that the same is correct, but he believes that most of the goods were shipped by himself, but they were not all purchased by him, but a number of the things in the account witness recollects of purchasing and shipping. A list of the account is hereto attached and made a part of witnesses testimony.

The account-book of Puckett, Hodges & Ward, is very much mutilated and the items difficult to be read.

Further witness saith nothing.

JOSEPH PUCKETT.

57 Sworn to and subscribed to before me, a notary public, on days and dates above written.

[L. S.] C. W. BRYANT,
Notary Public.

The defendant by counsel then called and had sworn the defendant, Asa Hodges, who testifies that he was the defendant in this case; that he was well acquainted with the plaintiff, Vaughan, and had been for many years; that he formerly resided in the State of Alabama, a neighbor to plaintiff; that he had a settlement with the plaintiff of all their business transactions, on the 22d day of December, 1869, at his plantation in Alabama; that, to the best of his recollection, everything between them was then and there settled and included in one note, which was then executed for three thousand two hundred dollars due one day after date, with his wife, Caroline Hodges, his security; that said note was not, to the best of his recollection, under seal; that he was satisfied he was correct in saying it was not under seal, although he would not be positive; that the reason why he was satisfied and believed that said note was
58 not under seal was that he remembered distinctly that the matter of said note, and it being sealed, was mentioned and discussed at the time, and that he told plaintiff that it did not matter whether it was under seal or not, that he would pay the note soon any way, and that after this statement plaintiff accepted the note without seal. He further proved that the two small notes sued on, one for $175 and the other evidencing a deposit for $447, was, to the best of his recollection, included in said settlement and merged in the note for $3,200 above named, and that he thought at the time that he took in said notes, and he still believed, they were included in said settlement; and he supposed he had the possession of said notes until the commencement of this suit. He stated that an account of the items, except said notes embraced in said settlement, was made up and signed by both parties at the time of said settlement, dated 22d December, 1859, which he produced in evidence on the trial, and the said accounts, on two papers, were read without objection on the trial.

59 *Accounts & settlement.*

1854.			
Jan.	1.	D. M. Husen, note	7 25
		Interest	3 30
1856.			
Dec.	2.	G. W. Alexander	25 00
		Interest	8 00

1857.			
Jany. 1.	Nn. Boyd		72 60
	Interest		17 42
1855.			
Jany. 1.	F. C. Owen		121 03
	Interest		48 00
1857.			
Feby. 11.	Walker & Warner		20 00
	Interest		4 00
1856.			
Mch. 15.	M. Farmer		5 00
	Interest		1 50
1854.			
Jun. 1.	Jas. Sullivan		1 00
	In		48
1856.			
Jany. 17.	C. C. Gwin		104 91
	Interest		54 00
'53.			
Nov.	C. C. Gwin		75 00
	Int		36 00
1856.			
Jany. 4.	Wiley Gallaway		64 75
	Int		20 60
1856.			
Jany. 1.	John Moore		104 00
	Int		33 00
'55.			
Jany. 7.	John A. Walker		151 00
	Int		60 00
1855.			
Jany. 20.	John A. Walker		50 00
	Int		20 00
			1,265 84
60 1853.			
Jany. 1st.	Jos. Odem		6 48
	Int		2 62
1854.			
Jany. 1.	T. J. McDaniel		40 00
	Int		19 20
1857.			
Dec. 31.	H. D. Boozeman		24 50
	Int		3 92
1852.			
Oct. 25.	J. Van Eaton		60 00
	Int		34 80
			$1,448 17

Settled this 22d December, 1859, by A. Hodge, note.

M. VAUGHAN.

A. Hodges in acc't with Dr. M. Vaughan.

1858.			
Mch. 1.	To amt. of M. Sims		1 00
	Int		16

	13.	Drew Bynum	3 00
		Int	48
1855.			
Jany.	5.	T. J. McDaniel	11 75
		Int	4 40
1858.			
		M. Priest	1 58
		Int	24
Nov.	6.	Sam Canterbury	2 16
		Int	18
1859.			
Jan.	8.	Wade Cooper's est	3 75
		Int	30
61 1856.			
Jany.	1.	A. Hodges	4 75
		Int	1 10
1858.			
July		Mrs. Hawkins	1 50
		Int	24
		James Warner	1 50
		Int	24
1858.			
June	14.	Wm. Garry	16 00
		Int	1 75
Feby.	15.	D. McBuell	14 14
		Int	2 20
July		R. Boyd, balance	6 25
		Int	98
Jay. 1, '58.		J. H. McDonald	4 77
		Int	74
Feby.	1.	D. Huson	1 50
		Int	24
Sept.	10.	Mrs. Brown	106 50
		Int	17 04
Mch.	1st.	G. Almin	1 50
		Int	20
Feby.	9.	J. S. Johnson	6 00
		Int	96
Aug.	11.	Mr. Ellis	2 00
		Int	12
		Mr. Pickens	2 50
		Int	30
1859.			
Jay.	31.	Lee Warn, for A. Rose	38 05
		Int	3 04
62 1856.			
		Drew Bynum	3 25
		Int	1 04
1858.			
		John Melam	3 00
		Int	48
1859.			
Jany.	1.	T. Hoflam	10 50
		Int	80
1856.		A. Hodges a/c	4 50
		Int	1 44

1859.			
Jany.	1.	Mr. Sullivan	3 00
		Int	24
1858.			
Feby.	1.	D. L. McCud	17 38
		Int	2 76
Jan.	19.	Jos. Leonard	19 50
		Int	2 34
May	24.	Dr. Mechaux	4 00
		Int	48
1858.			
Jan.	2.	John Mullinax	6 75
		Int	1 06
Mch.	28.	B. Milam	50
		Int	08
Mch.	2.	D. H. Walker, jr	153 76
		Int	21 65
1858.			
Jany.		W. Smith a/c	1 50
		Int	24
Feby.	6.	W. Boyd	35 50
		Int	4 88
	18.	R. Elliott	38 48
		Int	6 00
63	June	19. M. Seward	10 00
		Int	1 20
Apr.	1.	John McKelvey	150 00
		Int	21 00
		H. D. Bozeman	6 00
		Int	1 18
Jan'y	3.	R. Stowel	20 00
		Int	3 20
1858.		A. Hodges a/c	12 00
		Int	1 92
May	12.	Eliza Drane	39 74
		Int	4 75
July	14.	D. L. Dinsman	42 97
		Int	5 00
Jan'y.		M. Moody	6 00
		Int	96
1859.		W. F. Owen	28 50
		Int	2 28
Jan.	28.	John Gaely	40
		It	4
1st.		M. Chetwood	5 30
		Int	44
		Charles Gibson	15 00
		Int	2 40
1858.			
Ja'y.		John Walker	15 00
Ja'y 1, '57.		Int	2 40
		D. H. Walker, sr	101 50
Jan'y		Int	16 24
64	1856.		
	Jan'y	1. D. H. Walker	29 25
		Int	9 36

	Sandy Key		7 00
	Int		2 24
1858.			
Jan'y 1.	C. G. Green		10 00
	Int		1 60
1857.			
	C. G. Green		83 25
	Int		19 98
1858.			
Ja'y 1.	D. J. Goodlett		3 50
	Int		56
1857.			
Jan'y	D. J. Goodlett		14 80
	Int		3 55
1856.			
Jan'y 1.	D. J. Goodlett		10 75
	Int		3 44
1858.			
	F. C. Owen		296 50
	Int		118 60
1857.			
	F. C. Owen		86 75
	Int		20 82
1855.			
	Owen		24 50
	Int		9 80
1858.			
	Mr. McKelvy		24 00
			1 96
	John N. Walker		83 00
	Int		6 64
1857.			
Jan'y 19.	J. W. Bryant		6 00
	Int		48
	Amt. of cash		2,114 41
	Interest		25 00
65			6 00
			2,145 41
	To amt. of notes collected		1,448 17
			3,593 58
	Amt. of Gilbrook		26 00
			3,619 58
	Amt. of Hodges' ac. for 1857, 1858, 1859		63 00
	Amt. of Thos. Peter ac. for 1858		44 50
			3,727 08
	Credited by amt. of A. Hodges' ac. this day rendered, December 22, 1859		783 33
			$2,943 75

Closed by Asa Hodges' note of this date, December 22, 1859.

A. HODGES.
M. VAUGHN.

They were filed in the case pending the trial. He stated that he made up said account and memorandum of settlement before he went to his farm on the day of the settlement, and he could account for the difference in the amount or footing-up of said settlement in no other way, and from the additional fact that there were payments made by him and other advances upon said two small notes made by him before the date of said
66 settlement, and by mistake the amount of said small notes were not mentioned in the memorandum of settlement produced by him in evidence; that he met Vaughan during the war in Alabama, at or near Moulton, and offered to pay him the $3,200 in confederate money; this was some time in the year 1863, but Vaughan refused to take the confederate money; they had a long interview at that time, and the two small notes were not alluded to in any way, nor had Vaughan at any time told him that he had lost the $3,200 note, or that it had been destroyed. He further proved that he met Vaughan in the town of Marion, Crittenden County, Arkansas, some time in 1870, pending the election; that he, witness, was then a candidate for State senator in Arkansas, and was very busy in his election; that he had a crowd at his house, and he told Vaughan that he had better go to the hotel; that he could not then entertain him as he wished, and that he presumed the crowd around him did not suit his tastes; that the subject of the debt he owed Vaughan was then mentioned, and Vaughan told him his
67 business, and that he wanted what was owing him. Witness proved that he told plaintiff then that as soon as the election was over he would meet him in Memphis, and they would then have a settlement. Vaughan asked him what amount he, Hodges, had paid him, to which he replied that he did not certainly know, but he supposed somewhere between twelve and fifteen hundred dollars, but the books of Pucket, Ward and Hodges, at Memphis, would show the amount, and whatever the books showed he was willing to abide by and settle accordingly. Vaughan hooted at the idea that he had paid him the amount claimed, and witness laughed at him, and they then separated without settling; the next day after the election he rode to the hotel where Vaughan was stopping, and called to know if he was ready to go with him to Memphis, informing him that he was in a hurry. Vaughan replied that he was not ready and could not then go; that he had no conveyance or means of getting to Memphis then. Witness then proved that he remarked to plaintiff that he would meet him in Memphis next day at the house
68 of his commission-merchant; and they would take the books of Pucket, Ward and Hodges, examine them, and settle; that upon arriving at Memphis, when he went to dispatch to Little Rock he found that a steamboat was then about to start for Little Rock, and if he waited for Vaughan until next day he would lose the opportunity to go to Little Rock on said boat, and would be detained several days, which he could not afford to submit to, as he was greatly interested in the election, and was compelled to go to Little Rock to protect his interests. He accordingly took passage on the boat. But before leaving he wrote to Vaughan a letter, and left it with Dowdy, his commission-merchant, for delivery; in which letter he stated to Vaughan that he had directed Dowdy to take the books of Pucket, Ward and Hodges, and examine Vaughan's account, and if there was any balance in Vaughan's favor to pay him the amount in money; but he proved that he did not write such letter as Vaughan, in his testimony, described; that he did not authorize Dowdy to do anything else than as stated in said letter; that he gave him no authority or power to make
69 Vaughan the offer to pay him $1,200, as stated by Vaughan.

Witness further proved that he had very frequently, in 1860, 1861, and 1862, given Vaughan orders on the house of Pucket, Ward and Hodges, in Memphis, for groceries and supplies, and instructed said house to let Vaughan have whatever he wanted on what he owed Vaughan, and charge him, witness, with the amount; that said house has ceased to exist; Pucket is dead, and the firm dissolved; and that he, witness, who was one of its members, on settlement with said firm, had charged to him, and paid said house in settlement, somewhere about twenty-five hundred dollars on account of articles furnished Vaughan; but he did not personally know what amount of articles Vaughan actually received on account at said house, as he did not personally attend to the matters of said house, although a partner therein; the books showed the amounts. He further proved that Mrs. Susan Pucket, whose deposition has been read herein, was present at the time of the settlement, and ex-
70 ecution of the note for $3,200 on 22d day of December, 1859, also, her husband, who was now dead; that they, said Pucket and wife, lived on his farm in Alabama at that time, and he had hired the husband to go to Crittenden County, Arkansas, on a new farm he was then opening in said county; that Vaughan very well understood, at and before said settlement, that he, witness, was then about to move to the State of Tennessee. He further proved that the claims settled by him with Vaughan, and included in said memorandum of settlement, were collected by one his, defendant's, brothers, a lawyer, and that he, witness, never did personally have charge of said claims, but made the settlement from receipts, &c., given for the collection of said plaintiff's demands; that he and plaintiff both resided in the Southern States during the late war, and plaintiff knew all the time since the settlement of the 22d day of December, 1859, where he, the defendant, resided.

This being all the evidence offered by the defendant upon said trial, and all the evidence offered by either party in any way, after the argument of counsel, the court instructed and charged the jury as follows, to wit:

71 CHARGE OF COURT.

1. If you find from the evidence that the note for $175 and the certificate of deposit for $447.50 were embraced in the note for $3,200, and that this last-mentioned note for $3,200 was not under seal, then the defense of the statute of limitations to the whole action is made out, and the plaintiff cannot recover.

2. If the two small instruments were not included in the $3,200 note, the plea of the statute of limitations as to the sealed note for $175 is sustained, and it is also sustained as to the unsealed certificate of deposit.

3. If the note for $3,200, made December 22, 1859, was under seal, the statute of limitations does not bar it.

4. If the plaintiff's claims are not all barred by the statute of limitations, you will find the amount due him, but will exclude interest from August 16, 1861, to April 2, 1866, and deduct the amount which is
72 shown by the evidence to ' .ve been paid thereon.

5. If part payments were made they should be applied according to the understanding of the parties, if there was any such understanding; if there was no understanding, the creditor would have the right to apply them or to have them applied to the debt, if he had several debts, which would first become barred when the partial payment was made.

The question as to what debt the payment shall be applied on is one of no difficulty, if you find that the small debts were merged or included in the $3,200 note, for in that event all payments would of course be applied on that debt.

JOHN F. DILLON,
Judge.

No exception was taken by either party to the charge.

Whereupon the jury retired to consider their verdict, and afterwards on the same day returned into court the following verdict, to wit:

Verdict.

73 We, the jury, find for the plaintiff two thousand four hundred and ninety-two and $\frac{8}{100}$ dollars debt, and sixteen hundred and fifty-two and $\frac{14}{100}$ dollars damages.

BEN. T. EMBRY,
Foreman.

Whereupon the court upon said verdict rendered the following judgment, to wit:

Judgment.

It is therefore ordered, considered, and adjudged that said plaintiff, Milton Vaughan, do have and recover of and from said defendant, Asa Hodges, the sum of two thousand four hundred and ninety-two dollars and eight cents for his debt, and also the further sum of sixteen hundred and fifty-two dollars and fourteen cents for his damages, found as aforesaid, together with all his costs in and about this suit expended, and have execution therefor.

Afterwards, on Monday the 21st day of April, 1873, the defend-
74 ant, by leave of the court, moved the court in writing for a new trial in this case; which motion is in the words and figures following, to wit:

Motion for a new trial.

The defendant, Asa Hodges, by leave of the court first had and obtained, now comes and moves the court for a new trial in this case upon the following grounds, to wit:

1st. The court erred to the prejudice of the defendant in permitting, against the objection and exception of said defendant, pending the trial, illegal and incompetent testimony to go to the jury, whereby the jury was mislead, in this, to wit: The court permitted the plaintiff to testify and give in evidence before the jury the contents of an alleged lost letter, claimed to have been written by defendant to plaintiff, stating therein that defendant's commission-merchant, Dowdy, was authorized to act for him, defendant, in the premises; and then permitting plaintiff to prove the statements of said Dowdy, by which he, Dowdy, proposed to pay plaintiff four hundred dollars in cash, four hundred
75 dollars in twelve months, and four hundred dollars in two years. The contents of said letter and statements of Dowdy not being pertinent to the issues formed in this case.

2d. The finding and verdict of the jury is contrary to the law and evidence in this case.

3d. The amount found by the jury against the defendant is excessive and wholly unsupported by the evidence offered upon the trial.

4th. The jury erred in not finding a verdict for the defendant.

5th. The finding of the jury is contrary to the instructions of the court.

Wherefore the defendant asks the court to award to him a new trial.

BENJAMIN & BARNES,
Attys. for Deft.

Whereupon the court, after hearing said motion, and considering the same, overruled said motion and grounds for a new trial; which order is as follows:

MILTON VAUGHAN
vs.
ASA HODGES.

76 Comes the defendant, by Benjamin and Barnes, esqs., his attorneys, and files herein his motion for a new trial; and comes the plaintiff, by Gallagher and Newton, esqs., his attorneys, and the said motion is argued and submitted to the court; and the circuit court being well advised in the premises, considers that said motion be overruled and denied.

To the overruling of said motion and grounds for a new trial, the defendant at the time excepted, and prays that this, his exception, be made matter of record, and this being a full history of the whole case, the defendant asks a stay of the judgment of the court, and that he have an appeal from the judgment and rulings of said court to the Supreme Court of the United States, which is granted him upon the execution of such bond as required by law.

JOHN F. DILLON, [SEAL.]
Circuit Judge, Presiding.

MEMORANDUM.—The foregoing bill of exceptions reciting the
77 evidence is signed because presented at so late a period in the term that there is no time or opportunity to remodel it.

JOHN F. DILLON.

Filed April 22, 1873.

FRANK E. WRIGHT, *Clk*,
By RALPH L. GOODRICH,
Dep'ty Clk.

And on April 29, A. D. 1873, as follows:

MILTON VAUGHAN
vs.
ASA HODGES.

Comes the defendant, Asa Hodges, by Messrs. Benjamin and Barnes, his attorneys, and files herein his writ of error, which is allowed by the court, and also his supersedeas bond, approved by the court. Which bond is in the words and figures following, to wit:

78 Know all men by these presents that we, Asa Hodges and W. S. Oliver, Stephen Wheeler, H. Rudd, S. W. Dorsey, Thomas Smith, and J. B. Chaplin, are held and firmly bound unto William Vaughan in the sum of nine thousand dollars, to be paid to the said Milton Vaughan,

his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, which bond is upon the following condition, that is to say, whereas the above-named Asa Hodges hath proseecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by United States circuit court in and for the eastern district of Arkansas: Now, if the above-named Asa Hodges shall prosecute his said writ of error and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and effect.

79 Signed, sealed, and delivered.

ASA HODGES.
W. S. OLIVER.
STEPHEN WHEELER.
H. RUDD.
S. W. DORSEY.
THOS. SMITH.
J. B. CHAPLINE.

Clerk can approve this bond as sufficient.

GALLAGHER & NEWTON,
Attys. for Plff.

Filed and approved by the court April 29, 1873.

FRANK E. WRIGHT, *Clk*
By RALPH L. GOODRICH,
Deputy Clk.

80 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the 8th circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of their originals on file and remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this 21st day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-eighth.

Attest:
[SEAL.] RALPH L. GOODRICH, *Clerk.*

(Indorsement on cover:) No. 346. Asa Hodges, plaintiff in error, vs Milton Vaughan. E. Arkansas C. C. U. S. Filed 2nd December, 1873

Supreme Court of the United States.

ASA HODGES, Plaintiff in Error,

vs.

MARY A. SPEAKE, Adm'x of MILTON VAUGHAN, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DEFENDANT IN ERROR.

Milton Vaughan sued Asa Hodges in the court below on three separate instruments: the first, a note under seal, dated 22d December, 1859, and due one day after date, for $3,200, (this note was lost and could not be produced, Transcript, p. 2;) the second a note as follows:

Copy of second writing obligatory sued on.

[$175.00.]

On or by the 1st day of January, 1856, I promise to pay M. Vaughan the sum of one hundred and seventy-five dollars, with interest from date, for value of him received.

Witness my hand and seal this 1st day of January, 1855.

Indorsement.

Am't received in Memphis in 1859	$20 00
Cr. in 1860	20 00
	$40 00

The third, a receipt, as follows:

[$447.50.]

Dr. M. Vaughan has deposited with me four hundred and forty-seven dollars and fifty cents.

Jan'y 26th, 1857.

Indorsement.

Credit of the within in groceries sent from Memphis in 1860 and 1861---------- $10 00

Hodges pleaded vigorously to the suit—that he did not owe, had paid, *non est factum*, set-off, limitation, &c.

The case then went through the old form of replications, rejoinders, *similiters*, &c. Out of this multiplicity of pleading only one question is saved for the consideration of this court, and that is as to the 4th plea by Hodges, (LIMITATION.) To this plea Vaughan replied as follows, (Transcript, pp. 10 and 11:)

And as to the fourth plea of the defendant by him herein, the said plaintiff to so much thereof, wherein and whereby the said defendant seeks to avoid the plaintiff's recovery upon the several writings-obligatory in the first and second counts of the said declaration mentioned, by pleading thereto the statute of limitations of ten years, the said plaintiff says, *precludi non*, &c., because, he says that, after the accrual of the said several causes of action in the said two counts of said declaration specified, a state of hostilities existed between the United States and several of the States composing the same for a long space of time, to wit, from the 18th day of December, A. D. 1860, until the —— day of August, A. D. 1866, whereby the ordinary course of justice was interrupted, and judicial process could not be served upon said defendant; wherefore said plaintiff says that his cause of action in the two first counts of his said declaration mentioned did accrue within ten (10) years next before the commencement of this suit, and this the said plaintiff is ready to verify. Wherefore he prays judgment upon said two first counts in his said declaration specified.

And as to so much and such part of the fourth plea of said defendant, wherein and whereby the said defendant seeks to avoid the plaintiff's recovery upon the instrument in writing in the third count of the declaration of plaintiff, by pleading thereto the statute of limitations of five years, the said plaintiff says, *precludi non*, &c., because he says that, after the accrual of the cause of action in the said third count of said declaration specified, a state of hostilities existed between the United States and several of the States composing the same, and continued for a long space of

time, to wit, from the 18th day of December, A. D. 1860, until the —— day of August, A. D. 1866, whereby the ordinary course of justice was interrupted, and judicial process could not be served upon said defendant; wherefore said plaintiff says his cause of action did accrue within five years next before the commencement of this suit in the third count of his said declaration specified, and this he is ready to verify. Wherefore he prays judgment, &c.

To these replications Hodges rejoined as follows, (Transcript, p. 12:)

And for a rejoinder to the replications to the 4th pleas this defendant says, *precludi non*, because he says that, from —— day of ——, 1860, this defendant was a citizen of the State of Arkansas, and it is not true that hostilities existed between the United States and the State of Arkansas from the 18th day of December, 1860, to —— of August, 1866, whereby the ordinary course of justice was interrupted, and judicial process could not be served on this defendant, and of this he puts himself on the country.

And for a further rejoinder to the replication to the 4th pleas the defendant says, *precludi non*, because he says that the plaintiff, from A. D. 1860, to A. D. 1871, was, and still is, a citizen, resident, and inhabitant of the State of Alabama, and that this defendant during said time was a citizen, resident, and inhabitant of the State of Arkansas, both of which States were, on the —— day of August, 1861, by the proclamation of the President of the United States, declared to be in insurrection, and said proclamation prohibited all commercial intercourse between all citizens of the State in insurrection and of the citizens of the States not in insurrection; but this defendant avers that neither said proclamation, nor any law whatever, ever prohibited commercial intercourse between the States in insurrection; and this defendant avers that the Congress of the United States passed a law suspending the statute of limitations between citizens of the States in insurrection and the citizens of the States not in insurrection; but said law in no way suspended the statute of limitations between the citizens of the States in insurrection, among which were the States of Alabama and Arkansas; and this defendant avers that during the time named in said replication the courts in and for the State of Arkansas were open, and the ordinary course of justice was not interrupted, and the defendant could have been served with judicial process; wherefore this defend-

ant avers that, as between the plaintiff and this defendant, both of whom were, during the late insurrection, citizens of the different States that were in insurrection, the statute of limitations were in no way suspended, or stopped running against the supposed obligations and notes sued on; and this he is ready to verify. Wherefore he prays judgment.

To these rejoinders Vaughan demurred, and the court sustained the demurrer and Hodges excepted. That this demurrer was correctly sustained has been settled for some time. *Brown* v. *Hiatt*, 1 Dillon, 372, and note, p. 391; *S. C.*, 15 Wall., 177.

Upon the trial of the cause, both parties agree that the charge of the court is the law, and no exception is made. (Trans., p. 26.) The only remaining points are, the damages assessed are excessive, (Trans., p. 27,) and the court below erred in permitting Vaughan to testify as to the contents of a letter which he had received from Hodges, and which was lost, and also in permitting Vaughan to give the statements of Dowdy, Hodges' commission merchant, and by whom this letter was handed to Vaughan. (Trans., p. 16.)

The jury found for Vaughan only $2,492.08 debt and $1,652.14 damages. Upon this record, if any one should complain at the verdict, it is not Hodges but Vaughan. Hodges did well indeed, and has cause to be glad. If even the court might be of opinion the finding was excessive, yet it will not be set aside unless it is shown to be the result of prejudice, or reckles disregard of instructions, on the part of the jury. *Wightman* v. *City*, 1 Cliff., 524; *Stafford* v. *Pawtucket*, 2 Cliff., 82; *Johnson* v. *Root*, Ib., 108. Certainly there is no kind of showing that the jury was prejudiced, or that they disregarded the instructions of the court.

It would be difficult to find a case which comes more thoroughly under the rule of evidence as to proof of lost writings, and the production of secondary evidence, than this does. Before Vaughan was permitted by the court to

speak of the contents of the letter, he was required to state positively that such a letter existed; that it was lost, and he had made diligent search to find it, but to no purpose. The broadest foundation was laid for secondary evidence. 1 *Greenleaf Ev.*, (Redfield's Edition,) § 558, *et seq.*

It being proved that Dowdy handed this letter to Vaughan, and that Dowdy was Hodges' commission merchant, and that Dowdy had been empowered by Hodges to make settlement with Vaughan, the statements of Dowdy then made were correctly admitted in proof. 1 *Greenleaf, sup.*, §§ 108–113, *et seq.*; *Byers* v. *Fowler*, 14 Ark., 87.

There being no just ground of complaint at the result of this case on the part of Hodges, it is an appropriate, if not a handsome occasion to enforce the rule as to damages on affirmance, which is respectfully asked.

GARLAND,
For Defendant.